

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EXXON MOBIL CORPORATION, a New Jersey corporation,

NO. CV-09-0390-EFS

Plaintiff,

V.

FREEMAN HOLDINGS OF WASHINGTON,
LLC, a Washington Limited
Liability Company, d/b/a Million
Air-Moses Lake, and FRANCIS B.
FREEMAN, JR.,

ORDER RULING ON DISPOSITIVE
MOTIONS HEARD MARCH 1,
2011, and REQUIRING PARTIES
TO MEDIATE REMAINING CLAIMS

Defendants.

A hearing occurred in the above-captioned matter on March 1, 2011. Plaintiff Exxon Mobil Corporation ("Exxon") was represented by Guy Michelson. Vincent Booth and Harold Moberg appeared on Defendants Freeman Holdings of Washington, LLC ("FHW") and Francis B. "Chris" Freeman, Jr.'s behalf. Before the Court were several dispositive motions: 1) Mr. Freeman's Motion for Summary Judgment (ECF No. [113](#)), 2) FHW's Motion for Partial Summary Judgment (ECF No. [117](#)), 3) Exxon's Motion for Summary Judgment on Defendants' Counterclaims (ECF No. [121](#)), and 4) Exxon's Motion for Partial Summary Judgment for Conversion (ECF No. [125](#)). After reviewing the submitted material¹ and relevant authority

¹ The Court also reviewed the praecipe (ECF No. [229](#)) filed by ORDER ~ 1

1 and hearing from counsel, the Court is fully informed. This Order
 2 supplements and memorializes the Court's oral rulings. For the reasons
 3 given below, Mr. Freeman's summary judgment motion is denied, FHW's
 4 Motion for Partial Summary Judgment is denied and denied as moot in part,
 5 Exxon's "counterclaim" summary-judgment motion is granted, and Exxon's
 6 "conversion" summary-judgment motion is granted and denied in part.

7 **A. Factual Statement²**

8 1. Exxon's History at the Airport

9 Since the 1960s, Exxon supplied aviation fuel to customers at the
 10 Grant County International Airport in Moses Lake ("Airport"), leasing two
 11 above ground storage tanks (Tanks 24 and 38) and related hydrant
 12 facilities from the Port of Moses Lake ("Port"). Tanks 24's and 38's
 13 storage capacity is approximately 1.1 million gallons and 2.2 million
 14 gallons, respectively. Exxon contracted with a ground agent, Air America
 15 Fuel & Services, Inc. ("Air America"). Air America, which was owned by

16 Defendants on March 1, 2011, as well as Exxon's response (ECF No. [236](#)).

17 ² When considering these motions and creating this factual section,
 18 the Court did not weigh the evidence or assess credibility; instead, the
 19 Court believed the undisputed facts (ECF No. [177](#)) and the opposing
 20 party's evidence and drew all justifiable inferences therefrom in its
 21 favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).
 22 However, the Court did not accept as true assertions made by the opposing
 23 party if they were flatly contradicted by the record. See *Scott v.*
 24 *Harris*, 550 U.S. 372, 380 (2007). Disputed facts are supported by a
 25 citation to the record, while undisputed facts are not.

1 Larry Godden, stored, handled, and delivered Exxon's fuel to customers.

2 In mid-2008, Exxon decided to terminate its lease with the Port
3 effective December 31, 2008, for a number of reasons, including that the
4 storage tanks required Exxon to carry a large fuel inventory in order to
5 effectively pump fuel. Due to the tanks' inefficiency, Exxon believed
6 that the tanks would be decommissioned after December 31, 2008. On
7 September 25, 2008, Exxon notified the Port of its decision to terminate
8 its lease at the Airport effective December 31, 2008. On October 13,
9 2008, this notice was approved by the Port's Board of Commissioners.

10 2. Tanks and Fuel Handling

11 In a November 20, 2008 letter to Martin Tippl of Exxon, Port
12 Executive Manager Craig Baldwin advised that the Port wanted Exxon to
13 clean and inspect Tanks 24 and 38. Mr. Baldwin further stated, "in
14 considering the lease will be terminated on December 31 of this year, we
15 believe that time is of the essence." The letter also announced that the
16 Port intended to lease Tanks 24 and 38 to FHW; thereby making it clear
17 that these tanks would not be decommissioned by the Port as Exxon
18 previously thought. (ECF No. 127-3 at 36.)

19 Exxon was aware that its agreement with the Port required it to
20 clean and repair, normal wear and tear excepted, Tanks 24 and 38 at the
21 termination of its lease. Once Tank 24 was cleaned and repaired, Exxon
22 planned to transfer the fuel in Tank 38 to Tank 24, and Tank 38 would be
23 inspected, cleaned, and repaired. However, Exxon neither requested nor
24 received permission from the Port to occupy Tanks 24 or 38 after December
25 31, 2008.

1 Exxon hired Mr. Godden as its local agent to supervise the tank
2 cleaning and repair of both the tanks. Mr. Godden was aware that Exxon
3 planned to sell or remove the fuel from Tank 38, and preferably to FHW.
4 Exxon's preference was to sell the fuel to FHW because, in order to
5 remove all of its fuel, the Airport's hydrant system would have to be
6 shut down, thereby interrupting fuel service at the Airport.

7 On December 15, 2008, Mr. Tippl asked Mr. Godden to provide the name
8 of the FHW representative who handled the fuel purchase. Mr. Godden
9 initially responded that he would forward the purchase-related documents
10 to "the appropriate party at Freeman Holdings for review and
11 consideration," but later that same day, Mr. Godden reported: "I have
12 been informed that someone from AVFuel will be contacting you or your
13 designee for this transaction For any further discussion
14 pertaining to the sale of fuel at transition, the primary contact for
15 AVFuel is Mark Haynes. . . ." Exxon representative Debbie Hart attempted
16 to reach Mr. Haynes through her contact at AVFuel without success.

17 On or around December 17, 2008, Exxon initiated its tank-cleaning
18 plan. Jeffrey Koehn of Exxon traveled to Moses Lake to supervise the
19 fuel's removal from Tank 24 (approximately 35,000 gallons). On December
20 30, 2008, a third party, Saybolt, measured the fuel volume in Tank 38 and
21 the hydrant system. The Saybolt inventory identified a total of 403,579
22 gallons of fuel: approximately 345,000 gallons in Tank 38 and 56,000
23 gallons in the hydrant system. Mr. Godden immediately forwarded the
24 Saybolt report to Mr. Freeman. On December 31, 2008, Debbie Hart was
25 informed that AVFuel would not purchase the fuel in Tank 38 and thus
26 Exxon should deal directly with Mr. Freeman on this issue. Mr. Freeman
had previously engaged in similar fuel purchases after purchasing a fixed
ORDER ~ 4

1 base operation (FBO) where a predecessor's fuels remained in the tanks
2 when his business started operations.

3 On January 1, 2009, Exxon's 403,579 gallons of fuel remained in Tank
4 38 and the hydrant system. Exxon did not request or receive permission
5 from the Port of Moses Lake to possess, use, or occupy Tanks 24 or 38
6 after the termination of Exxon's lease on December 31, 2008. Neither FHW
7 nor Mr. Freeman contacted Exxon prior to December 31, 2008, to demand
8 that Exxon remove its fuel from Tanks 24 and 38 by that time; and Mr.
9 Godden testified that he understood that the tank-cleaning process would
10 continue into 2009. (ECF No. 127-2: Godden Dep. at 96-97.)

11 3. Post-January 1, 2009 Events

12 On January 7, 2009, Mr. Abugel, a fuel "exchange negotiator," sent
13 an email to Ms. Hart stating, "From a supply perspective, there are no
14 takers to do an in-tank sale to any of my usual trading partners." The
15 next day, Mr. Abugel contacted Mr. Freeman to negotiate the potential
16 sale terms. Mr. Freeman, negotiating on FHW's behalf, offered to pay
17 \$225,390 for the remaining fuel. Negotiations broke down when Mr.
18 Freeman insisted that he would only pay \$1.36 per gallon for half of the
19 remaining fuel. Exxon believed that this price was well below market
20 price and refused the offer.

21 On January 10, 2009, Exxon contacted Mr. Godden to inquire about the
22 status of a possible fuel sale to FHW. Exxon reaffirmed that if no sale
23 was reached, Exxon intended to remove its fuel from the Airport. On
24 January 23, 2009, Exxon requested that Mr. Godden confirm the amount of
25 Exxon's fuel at the Airport, and Mr. Godden confirmed the Saybolt report
26 figure. On January 26, 2009, Mr. Abugel sent a letter to Mr. Freeman

1 outlining three proposals for resolving the fuel situation: 1) allow
 2 Exxon to remove its fuel from Tank 38 and the hydrant system; 2)
 3 compensate Exxon with in-kind product at Moses Lake; or 3) compensate
 4 Exxon with in-kind product at another terminal. On January 28 and 30,
 5 2009, Mr. Godden again acknowledged Exxon's fuel inventory. And on
 6 January 28, 2009, Mr. Godden confirmed that he would not pump Exxon's
 7 fuel in Tank 38 contrary to Exxon's instructions.³ On February 2, 2009,
 8 Mr. Freeman rejected Mr. Abugel's three options and threatened criminal
 9 prosecution for trespass if Exxon attempted to recover its fuel.

10 By February 17, 2009, FHW pumped, sold, or otherwise disposed of
 11 358,174.78 gallons of Exxon's fuel from Tank 38. Exxon has not been
 12 compensated for its fuel. On its 2009 financial records, FHW listed the
 13 amount it received from AVFuels for this sold fuel, \$721,316.75, as an
 14 "accrued expense" or "current liability."⁴ (ECF No. 200-1 at 7-8, 22-25,
 15 & 47; ECF No. 227 at 11, 38.)

16 By late March 2009, Tank 24 was completely inspected, cleaned, and
 17 repaired. Most of the fuel in Tank 38 was then transferred to Tank 24
 18 (approximately 200,000 gallons). But FHW allowed Exxon to remove the

19 ³ Mr. Godden testified, "It was standard operating procedure that
 20 any time we went below four feet, that we needed the fuel supplier's
 21 authorization. It's their product. They control how it's delivered."

22 ⁴ The Court understands that FHW obtained \$721,316.75 as the
 23 payment from AVFuels; however, Mr. Balestrieri's February 23, 2011
 24 affidavit suggests the amount received may have been \$640,888.40. (ECF
 25 No. 229, Ex. A ¶ 12.)

1 remaining approximately 41,000 gallons of fuel in the bottom few inches
 2 of Tank 38 in April 2009;⁵ Exxon trucked and sold this fuel to Montana
 3 Refinery Company and received \$1.54/gallon for the fuel. Exxon then
 4 commenced inspecting, cleaning, and repairing Tank 38. This process was
 5 complete in late October 2009. The Port never criticized the speed of
 6 the tank-cleaning process, which Exxon paid for, including Mr. Godden's
 7 twenty-five-percent fee. (ECF No. 173-2: Godden Dep. at 95, ll. 19-23.)

8 4. Mr. Freeman and FHW

9 In July or August 2008, unbeknownst to Exxon or Western Petroleum,⁶
 10 Mr. Freeman began negotiations to acquire the two FBOs, including Air
 11 America, at the Airport. Mr. Freeman is the sole owner of "Freeman"
 12 limited liability companies through which he owns and operates multiple
 13 "Million Air" franchises across the country that provide fuel to
 14 customers at airports like Moses Lake. Mr. Freeman owns nine of the
 15 twenty-five U.S. Million Air franchises.

16 On September 19, 2008, before FHW was created, Mr. Freeman entered
 17 into an "abbreviated agreement" with Mr. Godden to purchase Air America's
 18 assets; Exxon was not a party to this agreement. The agreement
 19 contemplated a future formal contract between Mr. Godden and Mr. Freeman,
 20 or a "named limited liability company" to be created at a later date; the

21 ⁵ This was the first time that Mr. Freeman or any Freeman-related
 22 entity representative advised Exxon after February 2, 2009, that it could
 23 remove its fuel.

24 ⁶ Western Petroleum was Exxon's distributor. (ECF No. 118-5:
 25 Oldham Dep. at 48, l. 17.)

1 formal agreement was entered either on March 9 or 10, 2009. At the time
2 of the abbreviated agreement in September 2008, Mr. Freeman made the
3 initial \$5,000 down payment to purchase Air America's assets from a
4 personal account drawn from a Kansas bank. On November 14, 2008, Mr.
5 Freeman incorporated FHW, the corporate entity that would own and operate
6 Million Air Moses Lake—the entity which would take over Air America's
7 fueling services at the Airport. Mr. Freeman is now and has always been
8 the sole owner and manager of FHW.

9 On December 1, 2008, the Port and FHW executed two contracts: 1) a
10 Lease and 2) a Sublease and Fixed Base Operator Agreement. Pursuant to
11 the contracts, FHW's lease of the tanks, hydrant system, and other parts
12 of the Airport was to became effective on January 1, 2009.

13 Mr. Freeman hired Mr. Godden to serve as FHW's General Manager
14 beginning January 1, 2009. Therefore, from January 2009 to October 2009,
15 Mr. Godden served two roles: 1) FHW's General Manager and 2) Exxon's
16 agent for overseeing tank cleaning and repair.

17 Although Exxon was cleaning one of the tanks from January to October
18 2009, FHW did not lose any bona fide business opportunity.⁷ And during
19 the relevant time period, FHW had adequate fuel supply and met its Jet
20 A aviation-fuel customers' needs. In 2009, FHW operated at an \$855,859
21 deficit, as expected; it is typical for Mr. Freeman's FBO businesses
22 operate at a deficit when they commence operations at a new location.
23 (ECF No. 226 at 9.) Part of the deficit included the following

24
25 ⁷ FHW has a petty cash account in Moses Lake and bank accounts at
26 Stanley Bank in Stanley, Kansas.

1 consideration-free transfers: \$210,000 that Mr. Freeman drew out of the
 2 FHW account to himself, \$20,000 to another Freeman Holdings, LLC, and
 3 \$3,560 to Freeman New York. (ECF No. 200-1 at 36-37 & 47; ECF No. 226
 4 at 8; ECF No. 227 at 77; ECF No. 205, Ex. B.)

5 About six years of FHW's ten-year lease with the Port of Moses Lake
 6 remains; FHW has an option to extend the lease for an additional ten
 7 years. (ECF No. 229, Ex. A. ¶ 15.) Two of FHW's customers are the U.S.
 8 Air Force and Boeing. *Id.* ¶ 13. FHW has a four-year contract with the
 9 Department of Defense to provide fuel to military aircraft at the
 10 Airport.⁸ *Id.* ¶ 16. The Air Force is expected to continue to relocate
 11 its Fairchild Air Force Base operations from Spokane to the Airport until
 12 at least November 2011. *Id.* ¶ 17. As a result of the increased Air
 13 Force fueling operations, FHW expects its gross revenue for 2011 to
 14 exceed 18 million dollars. *Id.* ¶ 18. Since operating at the Airport,
 15 FHW has paid its not-at-issue debts, when due. *Id.* ¶ 19. Currently,
 16 FHW's assets, which primarily include non-judgment-recoverable assets
 17 such as upgrades to leased facilities, organizational costs, and
 18 goodwill, exceeds its liabilities. (ECF No. 226 at 8; ECF No. 229 ¶ 10.)

19 5. Lawsuit

20 On December 29, 2009, Exxon filed this lawsuit, seeking recovery for
 21 its fuel and a declaratory judgment. (ECF No. 1.) The Court has
 22 dismissed Freeman Holdings of Kansas, resolved a number of discovery
 23 issues, and denied Mr. Freeman's motion to dismiss. (ECF No. 24, 60, 85,
 24 ///

25
 26 8 The dates of this four-year contract is unknown by the Court.

1 86, 132, 138, 158, 159, 168, & 181.) The Court now resolves the four
 2 pending dispositive motions.

3 **B. Standard**

4 Summary judgment is appropriate if the record establishes "no
 5 genuine issue as to any material fact and the movant is entitled to
 6 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing
 7 summary judgment must point to specific facts establishing a genuine
 8 issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S.
 9 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
 10 U.S. 574, 586-87 (1986). If the nonmoving party fails to make such a
 11 showing for any of the elements essential to its case for which it bears
 12 the burden of proof, the trial court should grant the summary judgment
 13 motion. *Celotex Corp.*, 477 U.S. at 322.

14 **C. Mr. Freeman's Motion for Summary Judgment**

15 Mr. Freeman asks the Court to enter summary judgment in his favor
 16 on Exxon's alter-ego claims contending that Exxon failed to present
 17 evidence to support the necessary elements, namely that there is no
 18 evidence that Mr. Freeman deliberately intended to use the corporate form
 19 to avoid a duty owed to Exxon, or that disregarding the corporate form
 20 is necessary to prevent an unjustified loss to Exxon. Exxon contends
 21 triable issues of material fact exist.⁹

22
 23 ⁹ Exxon alternatively sought leave under Federal Rule of Civil
 24 Procedure 56(d) to conduct additional discovery relating to its alter-ego
 25 liability claim. Since Exxon filed its response, Exxon was given leave
 26 to conduct such discovery. (ECF No. 181.) Accordingly, the Court **denies**

1 The parties disagreed as to the corporate-veil-piercing standards.
 2 The Court resolved this issue in its February 10, 2011 Order Denying
 3 Defendant Freeman's Motion to Dismiss Pursuant to Rule 12(b) (6) (ECF No.
 4 181). The Court determined the following two elements must be proven
 5 before the equitable remedy of corporate-veil piercing applies: 1) the
 6 corporate form is used to violate or evade a legal obligation, and 2)
 7 corporate-veil piercing is necessary to prevent a loss to an innocent
 8 party. See *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 200
 9 (2009); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410-11
 10 (1982); *Washington v. Davies*, 176 Wash. 100, 114 (1934).

11 The first element (evasion of a legal obligation) requires "an abuse
 12 of corporate form" to the abuser's benefit and to the innocent party's
 13 detriment. *Meisel*, 97 Wn.2d at 410. Here, Exxon contends that
 14 Defendants will utilize FHW's corporate form to its advantage by shifting
 15 FHW's financial assets to either Mr. Freeman individually or to his other
 16 solely-held and controlled FBOs, thereby making it difficult or
 17 impossible for Exxon to satisfy any judgment that may be imposed in this
 18 action.

19 The Court recognizes that an individual may legitimately form a
 20 corporation to reduce liability exposure,¹⁰ see *id.*; RCW 25.15.050 (1) (a),

21 this request **as moot**.

22 ¹⁰ In regards to a limited liability company, the Washington
 23 legislature has recognized:

24 Members of a limited liability company shall be personally
 25 liable for any act, debt, obligation, or liability of the
 26 limited liability company to the extent that shareholders of
 a Washington business corporation would be liable in analogous

1 and that FHW's anticipated income stream is sufficient to satisfy any
 2 likely judgment in this case. However, there is no evidence as to where
 3 Boeing's and the U.S. Air Force's payments go, i.e., whether they are
 4 deposited into a FHW bank account, another Freeman Holding bank account,
 5 or a bank account in Mr. Freeman's name. And even if it is deposited
 6 into a FHW bank account, there is concern given the consideration-free
 7 financial transfers that have occurred that Exxon would be unable to
 8 serve a writ of garnishment on the FHW bank account at the precise
 9 necessary time before the money was transferred out in a consideration-
 10 free transfer. Accordingly, absent FHW stipulating that Exxon may
 11 garnish FHW's future income stream from either Boeing or the U.S. Air
 12 Force in an amount sufficient to satisfy any potential judgment, the
 13 Court determines that the trier of fact should consider whether
 14 Defendants, given the consideration-free draws, abused the corporate form
 15 to their benefit and to Exxon's detriment.¹¹ See *Minton v. Ralston Purina*

16 circumstances. In this regard, the court may consider the
 17 factors and policies set forth in established case law with
 18 regard to piercing the corporate veil, except that the failure
 19 to hold meetings of members or managers or the failure to
 20 observe formalities pertaining to the calling or conduct of
 21 meetings shall not be considered a factor tending to establish
 22 that the members have personal liability for any act, debt,
 23 obligation, or liability of the limited liability company if
 24 the certificate of formation and limited liability company
 25 agreement do not expressly require the holding of meetings of
 26 members or managers.

RCW 25.15.060.

¹¹ Exxon presents evidence of Mr. Freeman's thirty-five year old
 25 criminal conviction and other civil lawsuits. At this time, the Court
 26 agrees with Defendants that this conviction and other lawsuits are

1 *Co.*, 146 Wn.2d 385, 398 (2002) (manipulating the entities in order to
 2 avoid a legal duty); *Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App.
 3 638, 645 (1980) (discussing that fraudulent intent may be manifested if
 4 a corporation is extremely thinly capitalized); *Garvin v. Matthews*, 193
 5 Wash. 152, 156-57 (1938) (piercing the corporate veil if an innocent
 6 party is harmed by an individual using a corporation merely as an
 7 instrumentality to conduct personal business); *Davies*, 176 Wash. at 113-
 8 14 ("[W]here a private person so dominates and controls a corporation
 9 that such corporation is his alter ego"); Thomas V. Harris,
 10 *Washington's Doctrine of Corporate Disregard*, 56 Wash. L. Rev. 253, 258
 11 (March 1981) ("[T]here is such a commingling of property rights or
 12 interests as to render it apparent that the corporation and some other
 13 entity were intended to function as one.").

14 Likewise, triable issues of fact exist as to the second element,
 15 i.e., whether corporate-veil piercing is necessary to prevent a loss to
 16 an innocent party. This element focuses on whether the innocent party
 17 was harmed by the alter-ego conduct, fraud, bad faith, or other legal-
 18 responsibility-evading conduct. *Meisel*, 97 Wn.2d at 410; *Morgan*, 93
 19 Wn.2d at 587. Exxon has not received any financial remuneration for the
 20 358,174.78 gallons that FHW pumped, sold, or otherwise disposed. If FHW
 21 freely transfers money and assets to Mr. Freeman or other Freeman FBOs
 22 without any consideration, Exxon's ability to satisfy any potential could
 23 be harmed by Defendants' alter-ego conduct.

24 ///

25

 26 irrelevant to whether FHW is Mr. Freeman's alter ego.

1 The Court recognizes corporate-veil piercing is an equitable remedy
 2 imposed only in exceptional circumstances. *Eagle Pac. Ins. Co. v.*
 3 *Christenen*, 85 Wn. App. 695, 707-08 (1997). However, the application of
 4 this equitable remedy should be resolved at trial absent a stipulation
 5 by FHW ensuring that Defendants can satisfy any potential judgment
 6 through an appropriate garnishment. Accordingly, Defendant Freeman's
 7 motion is **denied**.

8 **D. Summary Judgment Motions Relating to Conversion**

9 Defendants¹² asks the Court to enter summary judgment in their favor
 10 as to Exxon's declaratory judgment and conversion claims because Exxon
 11 had no right to possess the fuel tanks after December 31, 2008, and
 12 therefore by its conduct it abandoned the fuel. In response, Exxon
 13 withdraws its declaratory-judgment claim,¹³ but opposes Defendants' motion
 14 as it relates to the conversion claim. Furthermore, Exxon filed its own
 15 motion asking the Court to enter summary judgment in its favor on its
 16 conversion claim.

17 A plaintiff establishes conversion if 1) he was entitled to possess
 18 the chattel, 2) he was deprived of such possession, 3) due to the

19 ¹² Only FHW filed this motion because Mr. Freeman did not understand
 20 that the Amended Complaint asserted a conversion claim against him.
 21 Because the Court finds that the Amended Complaint asserts such a claim
 22 against Mr. Freeman individually, and did so with the Court's permission
 23 (ECF No. 60), the Court construes this motion as also being brought by
 24 Mr. Freeman.

26 ¹³ Accordingly, Defendants' motion is **denied as moot in part**.

1 defendant's wilful interference, and 4) such interference was not
 2 justified. *PUD of Lewis Cnty. v. WPPSS*, 104 Wn.2d 353, 378 (1985) ("A
 3 conversion is the act of willfully interfering with any chattel, without
 4 lawful justification, whereby any person entitled thereto is deprived of
 5 the possession of it."); 29 Wash. Prac., Elements of an Action § 7.1.

6 Defendants contend that Exxon cannot establish the first, third, or
 7 fourth elements. As to the first "possession" element, Defendants
 8 contend that Exxon deprived itself of fuel possession when it left the
 9 fuel in the tanks after its leasehold interest ceased on December 31,
 10 2008. The Court disagrees.

11 The Washington Supreme Court in *In re Marriage of Langham* discussed
 12 the two "possession" approaches: an archaic approach and a modern
 13 approach. 153 Wn.2d 553, 565 (2005). The archaic-possession approach
 14 requires the plaintiff to establish either possession or the immediate
 15 right to possess the chattel; the modern-possession approach requires the
 16 plaintiff to establish only "some property interest in the goods
 17 allegedly converted." *Id.* The Washington Supreme Court did not
 18 expressly adopt one approach but did apply the modern approach. *Id.* The
 19 Court finds it need not adopt a specific approach because, under either
 20 approach, Exxon continued to hold title to the fuel after December 31,
 21 2008. Clearly, after December 31, 2008, Exxon did not have an express
 22 contractual right to use the fuel tanks. But FHW's contracts with the
 23 Port did not extinguish Exxon's title to the fuel contained therein,
 24 especially since the Port expected Exxon to inspect, clean, and repair
 25 the tanks. All entities—the Port, FHW, and Exxon—understood that the
 26 ///

1 tank-cleaning process would take months and therefore that Exxon would
2 maintain a presence at the Airport after December 31, 2008.

3 The circumstances here are distinguished from *Kruger v. Horton*, a
4 case relied on by Defendants. In *Kruger*, the seller of land could not
5 recover under conversion for the value of timber harvested by the buyer
6 before defaulting on the loan. 106 Wn.2d 738 (1986). A buyer of land
7 has the right to possess the land, including growing and harvesting crops
8 and timber thereon. *Id.* at 744. Here, at all relevant times, the land,
9 and fuel tanks and equipment thereon, have been owned by the Port. It
10 was the right to utilize a portion of the Airport, specifically the fuel
11 tanks and equipment, that changed from Exxon to FHW on December 31, 2008.
12 FHW's contractual right to utilize the fuel tanks and equipment beginning
13 on January 1, 2009, did not include gaining the title to Exxon's
14 remaining fuel.¹⁴ Accordingly, the Court determines that no triable issue
15 of fact exists: Exxon was entitled to possess the remaining fuel.

16 ///

17 ¹⁴ Even if the determination of whether Exxon's title to the
18 remaining fuel was questionable, possession to the rightful owner could
19 only be denied for the time reasonably necessary to make this
20 determination. See *Olin v. Goehler*, 39 Wn. App. 688 (1985) ("Assuming
21 there had been a valid dispute or conflicting claims to the personal
22 property, possession could have been denied . . . only for so long as
23 reasonably necessary to determine the identity of the rightful
24 claimant."). FHW's continued retention of all profits derived from the
25 fuel is not reasonable.

1 Defendant also argues that Exxon, not Defendants, deprived itself
2 of fuel possession and therefore Plaintiff cannot satisfy the second
3 element. This argument raises abandonment-type issues. Although a jury
4 may determine that Exxon was slow at addressing what to do with the fuel
5 remaining in the tanks on December 31, 2008, all evidence shows that
6 Exxon did not intend to relinquish its title to the remaining fuel. On
7 or before December 31, 2008, Exxon had contacted both Mr. Freeman and Mr.
8 Gooden and advised them of its desire to measure the remaining fuel.
9 Also, Exxon discussed with Mr. Godden the possibility of FHW purchasing
10 the fuel. After December 31, 2008, Exxon continued to discuss possible
11 methods to recover the fuel or its value. Accordingly, Exxon did not
12 abandon its title to the fuel and did not deprive itself of the right to
13 possess the fuel. *See Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 50
14 (1969) (setting forth abandonment standards); see also *Smith v. Favila*,
15 23 Wn. App. 59 (1979) (finding insufficient evidence to indicate that the
16 plaintiffs abandoned their personal property). Therefore, Exxon
17 satisfies the second element.

18 And because FHW has continued to retain the profits from the sale
19 of Exxon's fuel, the Court finds Exxon satisfies the "wilful" portion of
20 the third element. Yet, the jury must assess whether Exxon was deprived
21 of its fuel (or equivalent) *because of* Defendant(s)' wilful conduct,
22 i.e., the causation portion of the third element. Reasonable minds could
23 differ on whether Exxon should have been more proactive in ensuring that
24 1) it had removed its fuel on or before December 31, 2008, 2) it had a
25 buyer to remove the fuel on or before December 31, 2008, or 3) FHW would
26 purchase the fuel.

1 If the jury finds that Defendants' wilful interference caused Exxon
2 to be deprived of its fuel, then the Court finds it is clear that
3 Defendant(s)' interference was not justified. There is no evidence to
4 explain why Defendants were unable to provide Exxon with the money that
5 Defendants received for the fuel sold, which was sold by March 2009,
6 within a reasonable time period. And Defendants' goodwill is irrelevant
7 to conversion. *See Clapp v. Johnson*, 186 Wash. 327, 330 (1936) ("[G]ood
8 faith on the part of the defendant, in an action, cannot be shown as a
9 matter of defense."). Likewise, Defendants' business-necessity defense,
10 if one can be asserted against a conversion claim, fails because there
11 is no evidence that Defendants were unable to add additional fuel to Tank
12 38 or forward the financial-remuneration received for Exxon's fuel upon
13 receipt to Exxon. Accordingly, Exxon satisfies the last element as
14 well.¹⁵

15 ///

16 ¹⁵ Triable issues of fact exist as to whether Mr. Freeman is
17 individually liable for conversion given that Mr. Freeman was the
18 individual responsible for deciding to retain the fuel and not pay Exxon
19 when the fuel was sold. *See* RCW 25.15.125(2) ("A member or manager of
20 a limited liability company is personally liable for his or her own
21 torts."); *Montclair v. United Soccer Club v. Count Me In Corp.*, Case No.
22 C08-1642, 2010 WL 2376229, *4 (W.D. Wash. June 9, 2010) (recognizing that
23 a corporate officer can be liable for conversion if 1) the company
24 converted the plaintiff's chattel, and 2) the officer knowingly
25 participated in or approved the company's conduct).

1 Finally, if the jury finds causation (third element) in Exxon's
 2 favor, the jury should consider each party's conduct when assessing
 3 damages. Although Exxon's right to possess the fuel remained after
 4 December 31, 2008, the jury may determine that Exxon's damages were
 5 caused in part by its own delay.

6 In sum, Defendants' motion is **denied as moot** (declaratory judgment)
 7 **and denied** (remainder) **in part**; and Exxon's motion is **granted** (first,
 8 second, fourth, and part of third (wilful) elements) **and denied** (part of
 9 third ("due to"/causation) element and damages) **in part**.

10 **E. Exxon's Motion for Summary Judgment on Defendants' Counterclaims**

11 Exxon seeks summary judgment in its favor on Defendants'
 12 counterclaims for trespass and unjust enrichment because 1) Exxon owes
 13 no independent tort duty to Defendants, 2) Defendants have not been
 14 actually or substantially damaged by Exxon's remaining fuel, and 3)
 15 Defendants' own conduct does not allow it to recover under unjust
 16 enrichment. Defendants oppose the motion.

17 1. Independent-Duty Doctrine

18 Exxon submits that a tort recovery is barred if the alleged
 19 misconduct does not implicate a tort duty that arises independently of
 20 the contractual terms. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d
 21 380 (2010) (clarifying the economic-loss rule or, more appropriately
 22 termed, the independent-duty doctrine). Because the Court finds that
 23 Defendants failed to present sufficient evidence to survive summary
 24 judgment on both counterclaims, the Court need not address this issue.

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1 2. Trespass

2 A trespass action lies if an individual intentionally 1) enters the
3 land in possession of another, or causes a thing to do so, 2) remains on
4 the land, or 3) fails to remove from the land a thing which he has a duty
5 to remove. 16 Wash. Prac., Tort Law & Practice § 13.31 (3d ed. 2010).
6 The individual acts intentionally if he knows that the consequences of
7 the act are substantially certain; he need not intend harm. *Bradley v.*
8 *Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682 (1985). To obtain
9 relief, the claimant must have suffered resulting damage or the trespass
10 must be ongoing. *Id.*

11 The Court finds triable issues of fact exist as to whether Exxon
12 trespassed. Exxon's leasehold interest at the Airport expired on
13 December 31, 2009. Yet, the Port and FHW were aware that Exxon needed
14 to inspect, clean, and repair the tanks after December 31, 2009. (ECF
15 No. 127-3 at 36.) And the Port did not object to Exxon's post-January
16 2009 tank-cleaning efforts. Further, the Port, Exxon, and Mr. Godden
17 were aware that removing the fuel from Tank 38 and the hydrant system
18 while Tank 24 was being cleaning would have shut down fueling operations
19 at the Airport. Accordingly, a triable issue of fact exists as to
20 whether Exxon's decision to keep its fuel in Tank 38 and the hydrant
21 system after December 31, 2008, constituted a trespass.

22 Yet, this question of fact is largely academic, because FHW fails
23 to establish that it was actually or substantially damaged by Exxon's
24 trespass. See *id.* at 692 ("Since this is an element of the [trespass]
25 action, the plaintiff who cannot show that actual and substantial damages
26 have been suffered should be subject to dismissal of his cause upon a

1 motion for summary judgment."). There is no evidence that FHW lost
2 customers, was unable to service customers or sell fuel, or otherwise
3 actually damaged by Exxon's retention of fuel in Tank 38 and the hydrant
4 system or its cleaning of Tank 24, Tank 38, and the hydrant system.
5 Although FHW paid its full rental payment to the Port, there is no
6 evidence that its ability to financially profit from its leasehold
7 interest at the Airport was negatively impacted; in fact, the opposite
8 is true: it has retained the financial benefit received from selling
9 Exxon's fuel. Accordingly, Defendants failed to present sufficient
10 damages evidence to survive summary judgment. And because the fuel has
11 been removed either by FHW's sale of the fuel or by Exxon during the
12 cleaning process, there is no need to enter an injunction. See *Hedlund*
13 *v. White*, 67 Wn. App. 409, 418 (1992) (finding injunction appropriate for
14 an ongoing trespass). Therefore, the Court grants Exxon's motion and
15 enters summary judgment in its favor on the trespass counterclaim.

16 3. Unjust Enrichment

17 Exxon submits that it is entitled to judgment on FHW's unjust-
18 enrichment counterclaim. The Court agrees.

19 To establish unjust enrichment, FHW must prove 1) Exxon received
20 a benefit, 2) the received benefit was at FHW's expense, and 3) the
21 circumstances make it unjust for Exxon to retain the benefit without
22 payment. See *Young v. Young*, 164 Wn.2d 477, 484 (2008). There is no
23 evidence that Exxon's decision to keep its fuel in Tank 38 and the
24 hydrant facilities or its tank-cleaning activities caused FHW expense.
25 As discussed above, there is no evidence that FHW was unable to service
26 its Airport clients or that it incurred any extra expense due to this

1 fuel. Rather, the evidence is that FHW benefitted from this fuel because
2 it has retained the financial benefit received from the sold fuel for
3 over a year. Accordingly, Exxon's motion to dismiss the unjust-enrichment
4 counterclaim is **granted**.

5 **F. Conclusion**

6 For the above-given reasons, **IT IS HEREBY ORDERED:**

7 1. Mr. Freeman's Motion for Summary Judgment (**ECF No. 113**) is
8 **DENIED**.

9 2. FHW's Motion for Partial Summary Judgment (**ECF No. 117**) is
10 **DENIED AS MOOT** (declaratory judgment) **AND DENIED** (remainder) **IN PART**.

11 3. Exxon's Motion for Summary Judgment on Defendants' Counterclaims (**ECF No. 121**) is **GRANTED** (trespass and unjust-enrichment
12 counterclaims).

13 4. Exxon's Motion for Partial Summary Judgment for Conversion (**ECF No. 125**) is **GRANTED** (first, second, fourth, and part of third (wilful)
14 elements) **AND DENIED** (part of third ("due to"/causation) element and
15 damages) **IN PART**.

16 5. The parties are to mediate with Magistrate Judge Hutton. Both
17 counsel and a speaking agent, who has authority to settle the case, for
18 each party shall appear in person.

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6. If mediation is unsuccessful, the parties shall file either a joint or individual notice no later than **noon of the second day after mediation**, discussing whether and how this Order's rulings impact witness and exhibit lists (and objections thereto), motions in limine, and deposition designations (and objections thereto).

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide a copy to counsel.

DATED this 15th day of March 2011.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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